CONSTITUTIONAL COURT OF SOUTH AFRICA

Federation of Governing Bodies for South African Schools v Member of the Executive Council, Gauteng and Another

CCT 209/15
Date of hearing: 5 May 2016
Date of judgment: 20 May 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the validity of amendments to the Regulations for Admission of Learners to Public Schools in Gauteng (Regulations) promulgated in 2012.

On 18 July 2011, the Member of the Executive Council for Education, Gauteng (MEC) published draft amendments to the Regulations and invited comments from the public. The Federation of Governing Bodies for South African Schools (FEDSAS) submitted that a number of the regulations should be withdrawn as they were *ultra vires* the MEC's powers, flouted the principle of legality and caused a conflict between national and provincial legislation. The amendments were promulgated on 9 May 2012.

In the High Court, FEDSAS challenged the validity of the amended regulations. After considering each of the impugned regulations individually, the Court held that regulation 2(2A) was procedurally unsound and that regulations 4, 5 read with 8, 11 and 16 were *ultra vires* the MEC's statutory powers. The High Court saved regulations 5(5) and 11 by deleting certain words from the provisions. The MEC and the Head of Department for Education, Gauteng (HOD) petitioned the Supreme Court of Appeal which upheld the appeal save for regulation 2(2A).

In this Court, FEDSAS submitted that some of the impugned regulations were neither reasonable nor justifiable in terms of section 4 of the Gauteng School Education Act 6 of 1995. It further contended that there was a conflict between some of the regulations (provincial legislation) and the South African Schools Act 84 of 1996 (Schools Act –

national legislation), which rendered them inoperative by virtue of section 149 of the Constitution. It argued that the MEC's reasons for introducing the impugned regulations were without factual basis. The MEC and HOD contended that public schools cannot be governed in a manner that only catered for the interests of its incumbent parents and learners. They submitted that the regulations were not irrational or unreasonable. The respondents argued for the validity of the impugned regulations in light of their purposes. Equal Education was admitted as a friend of the Court. Its main submission highlighted the inextricable link between geography and race in South Africa and drew the Court's attention to the inadequacy of proximity as the sole criterion in the determination of feeder zones in the province. It argued that the default feeder zone regime, although only interim in nature, had the effect of unfairly discriminating between entry-level learners based on race.

In a unanimous judgment written by Moseneke DCJ (with Mogoeng CJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J, and Zondo J concurring) the Court found that there was no conflict between provincial and national legislation. This is because education is a functional area of concurrent national and provincial legislative competence. The Constitution anticipates the possibility of overlap and conflict between these legislative competences. The Court held that the regulations could be read in harmony with national legislation. Additionally, none of the impugned regulations were unreasonable, unjustifiable or irrational. Regulation 3(7) disallows a learner's prospective school from requesting confidential information from her current school. The Court held that the regulation was rational as its legitimate thrust is properly aligned to the objective of preventing unfair exclusion of a learner at the point of admission to a school. Regulations 4(1) and (2) empower the MEC to determine feeder zones. The Court found that the default feeder zone regime provided for in regulation 4(2) was intended to be transitional. They are set unilaterally and deny relevant stakeholders meaningful participation in a matter that affects a school materially.

Regulation 5 read with regulation 8 empowers the District Director to place an unplaced learner at a school that has not been declared full by the HOD. The Court held that the regulations were rational, reasonable and justifiable and not at odds with section 5(5) of the Schools Act. The HOD's power to determine learner enrolment capacity and declare a school full or not, assists the MEC to ensure that there are enough school places for every child. Regulation 11(5) empowers a District Director to consider the relative capacity of other schools in a district as a criterion for placing a learner in a particular school. The Court held it to be reasonable, rational and justifiable as its guiding purpose is to ensure that every learner is placed in a school. Regulation 16 allows a parent to lodge an objection with the HOD before appealing to the MEC. The Court held that the regulation does not add an extra layer to the appeal process and that it does not amount to delegation of powers.

Leave to appeal was granted and the appeal was dismissed, save in regard to regulation 4(1). The MEC was directed to set feeder zones as required by regulation 4(1) within a reasonable time,not later than one year from the date of the Court order.